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No. 95-622

In the Supreme Court of the United States

OCTOBER TERM, 1995

LESLIE GURDON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF RIVERHEAD SAVINGS BANK, FSB, AND AMERICAN SAVINGS BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erroneously excluded evidence and thereby vitiated the jury's determination that the failed bank had a good faith belief in the financial insecurity of the plaintiffs.

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OPINION BELOW

The opinion and order of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 47 F.3d 1157 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1995. A petition for rehearing was denied on July 12, 1995. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The petitioners, four motor vehicle dealerships and their principal stockholder and president, Leslie

Gurdon, had a banking relationship with Riverhead Savings Bank (the Bank). That relationship consisted of checking accounts for the respective dealerships, six "direct loans" to two of the dealerships documented by eight notes, and certain "recourse" consumer loans for vehicle purchasers, so-called because the Bank had recourse to the selling dealership if the purchasers of the vehicles failed to pay. The petitioner corporations also executed automatic charge authorizations (ACAs), which allowed the Bank to deduct monthly payments from the dealerships' deposit accounts to pay interest owed on the loans. Pet. App. A2-A3.

Each loan document provided that the Bank was entitled to accelerate all of petitioners' loans and set off all the funds in petitioners' accounts against those loans (i) in the event of default in payment of any obligation to the Bank, (ii) if the financial condition of the borrower impaired the Bank's security or increased its risk, or (iii) if the Bank believed itself to be financially insecure with respect to the loans. Neither notice nor demand was required under the terms of the notes. Pet. App. A2-A3. Each of the loans was personally guaranteed by petitioner Gurdon and cross-guaranteed by the other petitioners. Pet. App. A3; Gov't C.A. Br. 9-10.

During October, 1988, the Bank began to receive a series of telephone calls from Marine Midland Automotive Financial Corporation (MMAFC). The calls were intended to verify balances on deposit at the Bank and to reconcile the records of MMAFC, which was the "floor plan" financer for the dealerships. Pet. App. A5; C.A. App. 921, 924-929. At that time, several of the recourse loans were in default. C.A. App. 234-240. On October 14, 1988, Gurdon contacted the

branch manager for the Bank's Bayshore, Long Island, office, Reynaldo Segui, in connection with the inquiries from MMAFC. Gurdon stated that there was a "shortfall" in the balances he had reported to MMAFC. After initially telling Segui simply not to supply any further information to MMAFC, he then changed his mind and suggested that Segui "could lie for about $100,000" in his conversations with MMAFC until Gurdon could make a deposit in the Bank. Segui refused to do so. *Id.* at 964, 969-973, 1058-1059.

After business hours on October 14, 1988, a deposit was made at Riverhead consisting of two checks in the sum of $70,000 and $50,000, respectively. C.A. App. 1227-1228. The checks were drawn on an account at Citibank, N.A., in Bayshore, Long Island, that had a balance at that time of $19,908. The checks later were returned through the check collection system unpaid due to insufficient funds. *Id.* at 1233-1234.

As a result of the above events, the Bank considered itself to be financially insecure. For that reason, *inter alia*, it accelerated petitioners' loans and set off against the deposits of petitioners a total of $512,000 to pay off the outstanding indebtedness. Within a few days of the setoff, the Bank also dishonored several of petitioners' checks, and the Bank compelled petitioners to pay eight recourse consumer loans on which they were signatories. Pet. App. A3.

2. Petitioners filed this action in July, 1989, in the Supreme Court for Suffolk County, New York. C.A. App. 23-50. Petitioners alleged that the Bank had wrongfully dishonored checks and had wrongfully set off their accounts against debts owed to the Bank. Riverhead Savings Bank had been acquired by American Savings Bank in the summer of 1988. Thereafter, both banks failed, and the FDIC was

appointed as Receiver of both banks. On September 10, 1992, the FDIC removed the case to federal court. Gov't C.A. Br. 2.

Trial commenced on December 9, 1993. The district court initially ruled that petitioners could introduce evidence of their course of dealing with the Bank, and petitioners introduced evidence concerning the ACAs. The court then reversed itself, however, and excluded that evidence. The court ruled that, under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e), petitioners could not use the ACAs as evidence of the Bank's course of dealing to vary the terms of their written loan agreements. Under the court's ruling, petitioners could not use the ACAs to show that, because the Bank had the right under the ACAs to charge petitioners' accounts for loan payments that petitioners failed to make, those payments were not overdue. Pet. App. A3-A4.

The jury was instructed that petitioners had the burden of proving that the Bank had no right to accelerate petitioners' loans and exercise its right of setoff. It found that petitioners had failed to satisfy that burden. In particular, the jury returned a special verdict form that included findings that petitioners had failed to prove (a) that the loans were not past due when the Bank accelerated them and exercised its right of setoff, C.A. App. 1836-1838, and (b) that the Bank "could not reasonably have deemed itself, in good faith, to be financially insecure" at the time of acceleration and setoff, *id.* at 1838-1839. Accordingly, the district court entered judgment in favor of the FDIC. *Id.* at 1842.

3. The court of appeals affirmed in an unpublished opinion. The court rejected petitioners' contention

that the Bank had waived its right to rely on financial insecurity as a basis for its decision to accelerate petitioners' loans and exercise its right of setoff. Pet. App. A4. The court also held that there was sufficient evidence to support the jury's finding in favor of the FDIC on that point. Pet. App. A5. Therefore, the court held, regardless of whether the exclusion of the ACA evidence was proper, the Bank's financial insecurity provided an independent basis for the acceleration and setoff. The court accordingly did not reach the question whether the district court properly applied the *D'Oench, Duhme* doctrine or its statutory counterpart, 12 U.S.C. 1823(e), in its rulings excluding the ACAs. Pet. App. A5.

ARGUMENT

1. Petitioners argue (Pet. 13 n.10, 21-22) that the district court erred in ruling that the ACAs were irrelevant and that that error affected not only their ability to prove that the loans were not in default, but also their ability to prove that the Bank did not have a good faith belief that it was financially insecure. Therefore, according to petitioners, the court of appeals erred in affirming the judgment based on the jury's finding that they failed to prove that the Bank did not have such a good faith belief.

Petitioners' argument amounts at most to a claim that the the court of appeals, in affirming the judgment against them in an unpublished decision, misapprehended the significance of the ACA evidence in this case. Even if correct, petitioners' claim that the court of appeals misapprehended the record in this particular case would not warrant further review by this Court.

There was, in any event, ample evidence to support the jury's finding that the Bank reasonably believed itself to be financially insecure when it accelerated petitioners' loans and exercised its right of setoff. By October 21, 1988, when the acceleration and setoff occurred, Gurdon had asked the Bank's branch manager to misrepresent to MMAFC the balances in petitioners' accounts, C.A. App. 964, 969-973, 1058-1059; the Bank knew that Gurdon periodically had overdrawn accounts at several different banks, *id.* at 946-949; and the Bank knew that petitioner had attempted to deposit checks in the amount of $120,000 drawn on an account where only $19,908 was on deposit, *id.* at 1227-1228. That evidence was sufficient to support the jury's finding that the Bank reasonably believed itself to be insecure.

The fact that the Bank could have withdrawn payments from petitioners' accounts by using the ACAs would have been of no value to the Bank had petitioners simply withdrawn the funds in their accounts. If so, the ACAs could have done nothing to resolve the Bank's insecurity. The district court's ruling excluding the ACAs therefore had no bearing on the jury's finding that petitioners failed to meet their burden of showing that the Bank did not in good faith believe itself to be insecure.

2. Petitioners devote virtually all of their argument (Pet. 14-28) to their claim that further review is warranted to clarify the relationship between the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e), and to consider the bearing of each on petitioners' arguments that the ACAs were admissible on the facts of this case. The court of appeals, however, did not reach any issue concerning the *D'Oench, Duhme* doctrine or Section 1823(e), since its result rested on

ordinary principles of commercial and contract law. Accordingly, this case is not an appropriate one in which to address the issues that petitioners believe warrant the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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